



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 113 of 2009

DR. GEORGE GITAU WAINANAPLAINTIFF/APPLICANT

VERSUS

1. KENYA COMMERCIAL BANK LTD

2. EPHRAHIM WAMBU MIANO

3. A.M. MACHARIADEFENDANTS/RESPONDENTS

RULING

1. Before me is an Application dated 21.4.2009 premised on the provisions of Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules and the Plaintiff/Applicant seeks orders that the Defendants by themselves, their servants or agents be restrained by a temporary injunction from advertising for sale, disposing of, selling by public auction or otherwise interfering with his interest over title no. Kajiado/Kaputiei/4302 pending the hearing of the suit.
2. In his Affidavit in Support sworn on 21.4.2009, the Plaintiff depones that on 15.11.2007, he entered into a Sale Agreement with the 2nd Defendant, Ephraim Wambu Miano, to purchase titles Nos Kajiado/Kaputiei/4302 and 4303 at the total price of Kshs. 5 million. He was aware that the properties were charged to the 1st Defendant, Kenya Commercial Bank to secure a loan of Kshs. 1.4million. A Distribution Agreement was thereafter executed and its purpose was to set out the manner in which the total purchase price was to be paid including the fact that Kshs. 2.5 million would be paid directly to the 1st Defendant to ensure release of the properties from the loan advanced to the Plaintiff.
3. The Plaintiff adds that subsequently title no. Kajiado/Kaputiei/4303 was transferred to him and title issued on 17.6.2008. When he pursued the matter he was informed by the 3rd Defendant, A.W. Macharia, an advocate, that the title certificates for both parcel No. 4302 and 4303 could only be secured upon payment of Kshs. 3.1 million to the 1st Defendant. He protested to the Advocates Complaints Commission and the Police as he thought that he had been defrauded. Ultimately in any event, he became aware that the 1st Defendant had issued a Statutory Notice seeking to sell title no. 4302 unless Kshs. 8.27 million was paid to it. He contends that the purported intention to sell was illegal and a nullity ab initio since the 1st Defendant was aware of the sale by private treaty and section 73(a) of the Registered Land Act anticipated such a situation and he is entitled to an injunction pending hearing of the suit.
4. The 2nd Defendant's response as contained in his Replying Affidavit sworn 28.4.2009 is that the Plaintiff and two other

persons approached him and offered to purchase the two properties as they had knowledge that the 1st Defendant was seeking to realize its statutory right of sale. After negotiations, he agreed to the offer and entered into a Sale Agreement with the Plaintiff and they agreed that the 3rd Defendant would be their joint advocate. Later, the 1st Defendant refused to release the title for parcel no. 4302 unless Kshs. 3.1 million was paid and that the Plaintiff had misrepresented to the 2nd Defendant that the sum outstanding was Kshs. 1.4 million which was not the case neither, was the property at the risk of sale by the 1st Defendant. He prays that the injunction be denied as the Plaintiff's remedy lies elsewhere.

5. The 1st Defendant through an Affidavit sworn by one Anthony Kasyoka, Credit Support Manager, states that only title no. 4302 was charged to secure overdraft facilities to the 2nd Defendant. When the 2nd Defendant defaulted in repayment as agreed, the Bank attempted to sell the properties but the 2nd Defendant sought an injunction but the court in an unclear case declined to grant the orders sought. That there is no evidence that the 1st Defendant was involved in the transaction between the 1st and 2nd Defendants and therefore no injunction should issue against the 1st Defendant.
6. The 3rd Defendant filed grounds of opposition and in his case that the orders sought cannot issue against him as he was only acting in his professional capacity. .
7. From the submissions by advocates for the parties, what is not in issue is that the orders sought are really targeting the 1st Defendant Bank which gave notice of its intention to sell parcel no. 4302 aforesaid. Neither the 2nd Defendant nor the 3rd Defendant have done or prepared to do any act to which an injunction could properly issue. The property is still registered in the name of the 2nd Defendant and he has no right to dispose of it as feared by the Plaintiff and as for the 3rd Defendant, as an advocate, he has no such right at all.
8. I have also reproduced the Plaintiff's complaints against all the Defendants and my mind is clear that following the principles in Giella vs Cassman Brown Ltd [1973] E.A. 358, no injunction can issue against them. I say so because the Plaintiff engaged the 3rd Defendant as an advocate and signed a Sale Agreement with the 2nd Defendant well aware that title no. 4302 was not free of encumbrances. His only answer is that the 1st defendant was aware of the sale by private treaty. Section 73 (a) of the Registered land Act is relied on in that regard. The section provides as follows;

“73. On his tendering to the chargee such sums as would have been payable to the chargee if the chargor had sought to redeem the charge under section 72, any of the following persons, that is to say-

i. ***any person, other than the charger, who***

has an interest in the land, lease or charge charged; or”

ii. ...

iii. ...

9. The presumption in the above section is that for sale by private treaty to be performed the chargee should be paid ***“such sums as would have been payable to the chargee if the chargor had sought to redeem the charge.”*** The Plaintiff relies on a letter dated 26.11.2007 by the 1st Defendant to the 3rd Defendant's law firm. The Bank merely informed him as follows;

“Regarding your request for discharge of the above properties (4302 and 4303), kindly note that we can only consent to the request upon payment of the current realization values of the properties, which is Kshs.

3,100,000/=.”

10. The above response did not at all mean that the 1st Defendant had allowed sale by private treaty and I have seen no evidence that the 1st Defendant was even aware of the purported Sale Agreement with the Plaintiff. The Plaintiff has not denied that he was the one (*with his agents*) who approached the 2nd Defendant and knew that the property was charged to the 1st Defendant. Where did he get the sum of Kshs. 1.4 million as what was outstanding and due to the bank? He ought to have known the consequences of his actions but my mind is also clear that the 1st Defendant had a right under section 74 of the Registered Land Act to issue notice of intention to realize its security and it would make a mockery of the Statutory right of sale if chargors can enter into agreements with third parties calculated to defeat that right.
11. I see no prima facie case with a probability of success and the remedy for the Plaintiff lies elsewhere than in an injunction.
12. In the end, the Application dated 21.4.2009 has no merit and is dismissed with costs.

13. Orders accordingly.

Dated and delivered at **Machakos** this 5th day of **February 2010**.

Isaac Lenaola
Judge

In the presence of; Mr. Onyango h/b for Mr. Muhoro for Applicant

Mr. Mutua h/b for Miss Kimeu for

1st Defendant/Respondent

Isaac Lenaola
Judge